

SERVED : July 25, 1994

NTSB Order No. EA-4216

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of July, 1994

Petition of

ROGER A. PETERSON

for review of the denial by
the Administrator of the
Federal Aviation Administration)
of the issuance of an airman
medical certificate.

Docket SM-4041

OPINION AND ORDER

Petitioner has appealed the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on August 11, 1993, at the conclusion of an evidentiary hearing.¹ We deny the appeal.

By letter dated November 13, 1993, the Federal Air Surgeon denied petitioner's application for a third-class medical certificate. The letter cited petitioner's history of ventricular tachycardia and episodes of lightheadedness. The

¹A copy of the law judge's decision, an excerpt from the hearing transcript, is attached.

letter concluded that, not only was petitioner not eligible for any class of medical certificate, but the FAA had also determined that petitioner's medical condition precluded awarding him a special issuance (waiver) because his medical condition "precludes the safe performance of airman duties under any condition that could reasonably be prescribed."²

Petitioner appealed that decision to this Board, and the law judge affirmed the FAA's action. The law judge heard testimony from respondent and two physicians whose testimony was proffered by the Administrator, Drs. Poole and Eber, both Board-certified internists with cardiology and aviation medicine experience and whose qualifications to testify on his condition were not challenged by petitioner.

Petitioner mounts a general attack on the doctors' conclusions that he creates an unacceptable aviation risk. Yet,

²Title 14 C.F.R. 67.17 provides, as pertinent:

Third-class medical certificate.

(a) To be eligible for a third-class medical certificate, an applicant must meet the requirements of paragraphs (b) through (f) of this section.

(f) General medical condition:

(2) No other organic, functional or structural disease, defect, or limitation that the Federal Air Surgeon finds -

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected within two years after the finding, to make him unable to perform those duties or exercise those privileges.]

based on reports of petitioner's own doctor (Dr. Berman), and a consultation at the Mayo Clinic, Dr. Eber concluded that petitioner had a prohibitive functional limitation. Petitioner's two episodes, during stress tests, of non-sustained ventricular tachycardia (VT), Dr. Eber testified, were abnormal and serious, as one event usually cannot be reproduced. Tr. at 110.

Petitioner also underwent a second type of test, called an electrophysiologic study, where the drug isoproterenol is used to reproduce the effect of increased levels of adrenaline (e.g., high heart rate) . In petitioner's case, the drug produced an abnormal sustained vT. According to Dr. Eber, this result is seen in individuals with very significant heart disease, particularly coronary heart disease.

Dr. Poole added that the three episodes of lightheadedness reported by petitioner could be related to the vt arrhythmia or could be a symptom of carotid sinus hypersensitivity, when blood pressure and heart rate drop. Both doctors agreed that petitioner was suffering from a functional limitation that jeopardized flying safety through an incapacitating arrhythmia, rapid heartbeat, or even loss of consciousness, even if petitioner had never before felt ill when he was having a VT episode. Dr. Poole noted that a sustained tachycardia could interfere with a pilot's judgment.

Dr. Poole acknowledged a certain lack of specificity in the diagnosis but testified that, with the limited information, petitioner's condition could not be diagnosed with certainty.

The record contains evaluations from other physicians generally confirming the hearing testimony. See, e.g., Joint Exhibit 1 at 2. In fact, even Dr. Berman, petitioner's internist, noted for his file (id. at 22) that petitioner's chances of getting approval to fly were slim.³

Petitioner had no expert witness to overcome this testimony, and his questioning of these two doctors fails to present reason to reject their conclusions. Limited written statements by Dr. Berman (see e.g., id. at 29 ("my opinion is that Mr. Peterson does not have heart disease")), even without the damaging admission noted above, are unavailing, especially when he is not available for cross examination.

Petitioner's argument, on appeal, that the testimony of the Administrator's experts is not reliable and that the stress test results, especially, were not shown to be empirically valid, is unconvincing and misplaces the burden of proof. Nor did petitioner's testimony on his own behalf, to the effect that he is in good health and undergoes rigorous physical exercise with no noticeable effect on his heart, convince the law judge to find in his favor. Similarly, his further argument on appeal regarding the health of certain relatives, generally offering a lay person's explanation of his incidents of lightheadedness and

³It is unclear from the record whether further testing of other sorts (including cardiac biopsy) would clarify petitioner's condition. Medication has been rejected by petitioner's physicians, as the drug that would be used to treat the tachycardia is contraindicated for carotid sinus hypersensitivity.

overall health, is simply inadequate to overcome the physicians' testimony here.

Indeed, although petitioner attacks the medical judgments of the Administrator's physician/witnesses, he appears to recognize that, because his expert witness, his cardiologist, did not appear at the hearing to testify, he failed in that burden of proof and is therefore without grounds for appeal.⁴ We agree. We must also note that we are without authority to review the Administrator's declination of a special issuance. Petition of Doe, 5 NTSB 41, 43 (1985).

ACCORDINGLY, IT IS ORDERED THAT:

Petitioner's appeal is denied.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT, and VOGT, Members of the Board, concurred in the above opinion and order.

⁴"My burden of proof clearly could not be met in view of the fact that my cardiologist did not appear at the hearing" Appeal at 3. Petitioner also states (Appeal at 5) : "[I]f I had been willing to spend the money . . . which would be required to properly submit information consistent with my burden of proof[.]" Petitioner did not ask for a continuance to a date when 'his physician could appear.